Supreme Court of the United States

October Term, 1976

No. 76-779

CITY OF EUCLID, OHIO,
Petitioner,

vs.

JAMES FITZTHUM, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

RICHARD R. HOLLINGTON, JR.
THOMAS M. SEGER
BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115
(216) 621-0200
Counsel for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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QUESTION PRESENTED

Whether, where the record evidence establishes that a municipal ordinance, as applied, is arbitrary and unreasonable and bears no substantial relation to the promotion of the public health, safety, morals, or general welfare and that the ordinance has been enforced in a discriminatory manner, the ordinance is unconstitutional as applied.

CONSTITUTIONAL AND STATUTORY PROVISIONS OMITTED FROM PETITIONER'S BRIEF

Ohio Constitution, Art. XVIII, Section 3:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

28 U.S.C., Section 1257(3):

> *State courts; appeal; certiorari*
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

COUNTERSTATEMENT OF THE CASE

A. Introduction

On December 8, 1976 the City of Euclid (hereinafter "Petitioner") petitioned this Honorable Court to review through a Writ of Certiorari two decisions of the Court

of Appeals of Ohio for the Eighth Appellate District, *Euclid v. Fitzthum*, and *Euclid v. Rees*. This Brief in Opposition addresses solely Petitioner's attempt to obtain review of the *Fitzthum* decision.*

Euclid v. Fitzthum is a criminal prosecution of five of Petitioner's residents, James Fitzthum, Lyndale Payne, Robert Wisniewski, William Peattie, and William Smith, under Section 1377.06 of Petitioner's Codified Ordinances which establishes a comprehensive ban on the outdoor parking of all trailers and similar vehicles within residential areas of Petitioner. The five Respondents were cited under this provision for parking their familys' recreational camping vehicles outside their homes in their backyards or on their driveways. The Euclid Municipal Court found the Respondents guilty of violating Section 1377.06 but the Court of Appeals reversed, holding the ordinance unconstitutional as applied in their five cases. The Ohio Supreme Court, finding the case to be neither of any great or general public interest nor to present any substantial constitutional questions, refused to review this decision. Since, as will be demonstrated herein, no substantial federal question is raised by this matter, this Court, like the Ohio Supreme Court, should also refuse to review this action.

B. Facts

Since Section 1377.06 had previously been held to be constitutional on its face, see *City of Euclid v. Paul*, (Ct. of App., 8th Dist., Case No. 33024, Feb. 14, 1974; *motion*

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*The Respondents in *Fitzhum* object to Petitioner's attempt to couple their case with the *Rees* case and to obtain review in both matters through the single Petition which Petitioner has filed. As Petitioner's review of the history of these cases indicates, these two cases were separately considered by the Ohio Court of Appeals and the Ohio Supreme Court and no basis exists for the consolidation of them herein.

to certify denied, June 17, 1974), Respondents defended their citations in this action on the ground that the ordinance was unconstitutional *as applied to their specific circumstances*. Their position, in brief, was that the ordinance, *as applied to each of them,* was unreasonable and arbitrary and bore no substantial relation to the promotion of the health, safety, morals, or general welfare of the citizens of the City. Consistent with this defense, an extensive factual record concerning all of the details of the operation and parking of the recreational vehicles by each of the individual Respondents was developed at trial. Since this detailed record is the entire basis for the decision of the Court of Appeals, it is necessary to set forth the facts adduced at trial more fully than Petitioner has.

1. Euclid Zoning Commissioner

Petitioner presented its case in chief through its Zoning Commissioner who testified that after observing a recreational vehicle parked outside in the backyard of each of the Respondents, he swore out affidavits charging each of them with a violation of Section 1377.06. The Commissioner also described the procedures he used in enforcing the ordinance and the types of vehicles which fall within the scope of the provision. In this regard he noted that *boats on trailers are governed by the ordinance* but that *boats off trailers and vans and campers licensed as station wagons are not covered.* He also acknowledged that in one case his own records demonstrated that a citizen had been authorized to park a truck outside behind his garage in open violation of the ordinance. When asked how the ordinance promoted the public health, safety, morals, or general welfare, the Zoning Commissioner stated only that he believed that the ordinance promoted aesthetic interests by curbing "sight pollution."

2. The Individual Respondents

Each of the individual Respondents testified concerning the type of recreational vehicle they own and the location of their vehicle on their property. As would be expected, this testimony was quite detailed. Respondent Payne testified, for example, that his lot in Euclid is 60′ x 325′ and that he parks his travel trailer approximately 50′ behind his home and 5′ in front of his garage. At this location the trailer is approximately 125′ in front of his rear property line and 30′ and 20′ from the two side property lines. Respondent Peattie testified, contrary to Petitioner's representation of the record, that he parks his vehicle to the rear of his house beside his garage some 40′ behind his house and 6′ to 8′ from his garage. All of the other Respondents testified in a similar manner about the parking in their backyards of their campers. In addition, they each described the apparatus and appliances in their vehicles and stated that none of them had ever had fires or vermin in the campers when parked as described. They added that their campers are always locked when parked and that no one has ever slept in them nor have any children ever played in them when they are parked in their respective locations. Respondent Payne also testified that in April 1974, the month in which he and the other Respondents were cited for violating the ordinance, he counted "at least 35 trucks" and two or three campers parked outside in the parking lot of a housing complex which Petitioner owns and operates.

3. Expert Witnesses

A substantial body of expert testimony was also adduced at trial concerning the impact of the location of each of the five Respondents' vehicles on the public health, safety, morals, and general welfare. A Cleveland Fire

Department Captain testified that, based upon his examination of the location of each of the five vehicles, no fire hazards were presented by their parking. A technical expert familiar with the mechanical devices and systems found in Respondents' recreational vehicles testified that no health or safety dangers were presented by the vehicles as parked, but that a serious safety problem involving asphyxiation or explosion would result if the vehicles were parked in an enclosure as required by Section 1377.06. This was due to the fact that the enclosure would trap and hold exhaust fumes generated by the operation of the appliances in the vehicles and sewer and propane gas from the sanitary systems and propane tanks on the campers. A recognized urban planning expert testified that he could identify no positive impact on the public health, safety, morals, or general welfare which would result from moving the individual Respondents' five vehicles from their present locations and placing them in enclosures. He also testified that he is thoroughly familiar with the typical zoning provisions in communities in the Cleveland area which govern the parking of recreational vehicles and that these ordinances generally treat such vehicles as common *residential accessory uses*. He added that Section 1377.06 is, to his knowledge, the most restrictive provision of this sort in Cuyahoga County. Finally, a real estate appraisal expert testified that none of the five vehicles, as parked, would have any affect on the appraisal value of the real estate in the neighborhoods in which the Respondents reside.

4. Public Officials

A number of public officials, including the Mayor and two City Councilmen, also testified. The Mayor stated that the original purpose of Section 1377.06 was to prevent people from living in trailers in the City. He acknowledged, however, that Section 1373.01(22) of the City's ordinances, which had been subsequently adopted, prohibited living in trailers in the City and thus expressly accomplished the purpose of Section 1377.06. The Mayor also made it clear that the reason for enforcing the ordinance was to promote aesthetic interests. One of the Councilmen who was called acknowledge agreeing with the statement by a fellow Councilman that Section 1377.06 promoted only aesthetic interests. He also testified that Section 1377.06 did not cover boats not stored on trailers. A second Councilman, who was called by Petitioner, testified that the only objection to the parking of the Respondents' vehicles he could see was an aesthetic one. He added that he had investigated liberalizing Section 1377.06 and would like to have the City consider revising it.

5. Rebuttal Witnesses

Petitioner, in rebuttal, called a number of witnesses to try to relate the enforcement of Section 1377.06 to the legitimate ends of the police power. However, none of this rebuttal testimony was applicable to the circumstances attending the parking of the five individual Respondents' recreational vehicles.

A Euclid Police Captain testified, for example, that the Police Department's only complaint about recreational vehicles occurred when people were living in them and that a safety problem might be presented if a recreational vehicle was parked in front of the building line on a street. Since all of the Respondents' vehicles are parked in their backyards and since no one has ever slept or lived in any of these vehicles when parked in the City, this testimony was irrelevant. The Euclid Fire Chief testified that a number of fire fighting problems might arise if a recreational vehicle was parked in a driveway between

two homes. He added that fires might be likely to start in recreational vehicles because campers are frequently equipped with propane tanks. The Fire Chief's concern about vehicles parked in a driveway was wholly irrelevant to the Respondents' situations, however, since none of the Respondents' vehicles are parked in a driveway between two homes. Moreover, on cross-examination, the Chief testified that there had not been a fire in a camper or recreational vehicle in Euclid in the 50's, 60's, or 70's and that there had never been a propane fire in the City to his knowledge. He added that if a fire were to occur in a recreational vehicle, it would be preferable to have the vehicle outside rather than in an enclosure because if the vehicle were enclosed, the fire would take longer to discover and, in all likelihood, would spread to the enclosure, thereby becoming larger.

On this record, and particularly the evidence which established that, in Respondents' cases, the legitimate ends of the police power would be harmed rather than promoted by requiring the enclosure of their vehicles, the Court of Appeals held Section 1377.06 to be unconstitutional as applied.

REASONS FOR DENYING THE WRIT

Introduction

In seeking to persuade this Court to accept this case for review Petitioner makes the identical argument it made to the Ohio Supreme Court in its unsuccessful attempt to convince that Court to exercise its discretionary jurisdiction. Petitioner's argument, in brief, is that *Fitzthum* somehow undercuts the right of a municipality sustained in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), to

adopt comprehensive zoning legislation which establishes residential and other use districts within a city. Petitioner reaches this somewhat staggering conclusion by arguing that *Fitzthum* authorizes conducting commercial activities within residential areas of the City. Petitioner asserts, for example, that:

> The Court of Appeals has denied constitutionality support to a provision of a comprehensive zoning code . . . which erodes and renders meaningless the creation of residentially zoned districts, *i.e.*, what good is the authority to create residential districts . . . if commercial accessories therein cannot be prohibited or limited. (P. 14).*

Using what might be characterized as, at best, "expansive reasoning," Petitioner predicts that *Fitzthum* will most certainly lead to:

> instant trailer camps; instant creation of an additional dwelling unit where zoning prohibits an additional zoning dwelling unit; potential overcrowding; the display of signs on trucks, accessory to commercial uses; intrusion of moving vans, cement mixers and other construction trucks, etc.; conversion of residential property to commercial property, etc. (P. 7).

Unfortunately, nothing even approaching "commercial activities" is involved in this case. Similarly, this case does not concern prohibitions on signs, billboards, cement mixers, or trailer parks. To the contrary, as demonstrated above, this case concerns only five families who park their own camper vehicles in their own backyards. Moreover, no unique or novel issue of federal law is presented by this decision. Rather, this case involves nothing more

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*Reference to Petitioner's Petition is abbreviated throughout as "P. .....".

than the application of the well-settled principle that zoning measures, as applied, must be reasonable and must bear a substantial relation to the promotion of the legitimate ends of the police power to withstand constitutional scrutiny. Certainly there is nothing novel about this legal principle and nothing in the Court of Appeals' application of it in this case which places any limitation on a municipality's ability to adopt comprehensive zoning legislation. For these reasons, this case is not one which merits review by this Court.

1. No Substantial Federal Question Is Presented Herein.

In order to warrant review through a Writ of Certiorari it is well settled that a state court decision must present a substantial federal question for resolution. See *Herb v. Pitcairn,* 324 U.S. 117 (1945). No issue of this sort is presented in this case.

The only aspect of this case which Petitioner may point to *as even involving* a federal question is the standard to be applied in determining whether a specific zoning provision is constitutional *as applied.* Seizing upon this, Petitioner suggests that this Court should take this matter for review so that it may clarify, in some manner which Petitioner fails to express, this standard as applied to zoning regulations governing the parking of recreational vehicles. Apparently Petitioner is suggesting that some special standard of review be established for zoning provisions governing campers.

This justification for reviewing this case is patently without merit. In the first place, the standard for reviewing the constitutionality of a state or municipal body's exercise of the police power is well settled and needs no clarification. The rule is well established that a regu-

lation enacted pursuant to the police power which does not involve "suspect classifications" or "fundamental interests" must, in order to withstand Due Process and/or Equal Protection scrutiny, be reasonable and non-arbitrary and must promote in a substantial manner the legitimate ends of the police power, specifically the public health, safety, morals, and general welfare. *Nebbia v. New York,* 291 U.S. 501, 525-529 (1934). Since zoning ordinances are but one type of regulation enacted in the exercise of the police power, this standard has long been applied in determining the constitutionality of such provisions. *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Curtiss v. Cleveland,* 170 Ohio St. 127 (1959); *Pritz v. Messer,* 112 Ohio St. 628 (1925); *State ex rel. Stulbarg v. Leighton,* 113 Ohio App. 487 (Hamilton Cty. 1959).

Moreover, it is quite apparent that this is the standard the Court of Appeals applied in this case and that, on the record before it, the Court's application of this standard was correct. The Court of Appeals described the test it was applying as follows:

> Five decades ago the Supreme Court of the United States testing another Euclid ordinance set down the *general principles for measuring municipal enactments by Federal Due Process Standards*:
>
> ". . . before the ordinance can be declared unconstitutional . . . such provisions [must be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. . . ."
>
> Approximately six months earlier the Ohio Supreme Court had expressed the same Due Process sentiments in upholding a zoning ordinance against federal and state constitutional attack:

> ". . . If the ordinance discloses no purpose to prevent some public evil or to fill some public need, and has no real or substantial relation to the public health, morals, and safety, it must be held void." (Emphasis added) (P. A6-A7)

The Court analyzed the facts in the record before it under this standard as follows:

> The vice of the present ordinance is that the record will support neither an application of the ordinance which bears a substantial, and therefore reasonable, relationship to public health, safety, morals or welfare nor the imposition of a taxonomic scheme based on any state of facts that may reasonably justify it. Part of the lack of reasonableness is exposed by evidence of an uneven regulatory application which contravenes the imperatives of the *Yick Wo* case.
>
> A short review of the facts will illustrate the constitutional inadequacies of the ordinance.
>
> The operative element in the enactment is the requirement that trucks, trailers, house trailers, auto trailers, or trailer coaches not be parked in the proscribed zones unless parked or stored in a "completely enclosed structure". The evidence indicates that whatever factors detrimental to public health, safety, morals or welfare inhere in parking the designated vehicles in the open, these factors are not bettered, and may be worsened, by enclosing them.
>
> * * * * *
>
> Where, then, are the Due Process and Equal Protection vices of the ordinance? They lie in the indisputable fact that enclosing vehicles classified as trailers does not change the fire hazard propensities; does

> not enlarge health safeguards. Indeed, it is clear beyond peradventure that enclosure may diminish health and safety factors by trapping sewage spillage from portable sanitary facilities (Tr. 335, 349, 350) and collecting highly flammable escaping propane gas which would otherwise be dissipated in the air (Tr. 333, 348). These are factors too obvious to be resolved on mere credibility determinations. They point up the arbitrariness and unreasonableness of the attempt to regulate. Uncontrovertible eviden e also supports the Equal Protection violation in requiring vehicles in the trailer classification to be enclosed. This evidence is to be found in omission of boats from the proscription unless parked on trailers—despite the obvious fact that non-trailer boat parking so decreases mobility that a boat so stationed is a greater safety hazard than one capable of movement on wheels.
>
> This posture of the evidence leads us to conclude that the ordinance as applied contravenes both Due Process and Equal Protection and is void. Assignments of Error Nos. 1 and 2 have merit. Accordingly, the convictions of these defendants are invalid. (P. A9-A11)

It is difficult, if not impossible, to discern what substantial federal question arises for resolution from this well-reasoned application of this long-settled standard to the facts of this case. Indeed, Petitioner offers no suggestion as to any federal question which is presented other than its unspecific assertion that the standard the Court of Appeals applied might somehow be clarified. How this might be accomplished or why this is necessary Petitioner does not explain. Certainly no basis exists for promulgating a new standard of review which would be applicable only to zoning legislation regulating the parking of camp-

ing or recreational vehicles. If this were done, the only result would be a proliferation of standards of review for as many types of activities as are presently governed by zoning legislation. Such a development could only lead to uncertainty and unnecessary confusion in the law.

One matter which is clear from the Court's opinion is that Petitioner has both totally misunderstood and misrepresented the Court's Equal Protection analysis in its statement of the questions it alleges are presented for review. The Equal Protection infirmity which the Court found in Section 1377.06 arises from the arbitrary nature of a regulatory scheme which *covers boats on trailers but excludes boats not on trailers,* the latter obviously presenting a greater safety hazard. Presumably Petitioner's misrepresentation is explained by its misunderstanding.

2. The Court of Appeals Correctly Applied Ohio Law Relating to a Municipality's Exercise of the Police Power in Holding Section 1377.06 Unconstitutional As Applied.

Petitioner's second suggested reason why this Court should accept this case for review—namely, to give the Court an opportunity to resolve "conflicts among state courts concerning the standard of review applicable to individual provisions of zoning ordinances"—hardly merits comment since the resolution of conflicts *between state courts* is not and has never been a basis for the issuance of a Writ of Certiorari. 28 U.S.C., Section 1257(3) specifically sets out the circumstances in which a state court decision may be reviewed by a Writ of Certiorari and a conflict between state courts is not one of the conditions specified in this statute. This argument does underscore a second basis for denying the Writ requested, however,

since it highlights the fact that the Court of Appeals' decision is based in large part on Ohio law.

In Ohio Article XVIII, Section 3 of the Ohio Constitution, the so-called "police power" provision, is the source of the authority of municipal bodies to enact zoning regulations. Naturally the scope of the police power varies from state to state depending upon the exact text of the state constitutional or statutory provision which vests the police power in municipalities and the interpretive gloss the state's courts have placed upon the grant or exercise of this power. In Ohio, for example, Article XVIII, Section 3 places certain definite limitations on its exercise, namely that no action taken in the exercise of it shall contravene any "general laws" of the state.

A further example of the variation which exists in the latitude allowed in the exercise of the police power is the extent to which aesthetic considerations may be used to support zoning regulations. In some states, New York for example, the courts have held that zoning which promotes only aesthetic interests is sufficiently related to the legitimate ends of the police power to withstand constitutional challenge. *See, In Re Suddell v. Zoning Board of Appeals of Larchmont,* 327 N.E.2d 809 (N.Y. 1975). The courts of Ohio, on the contrary, have consistently held that a zoning provision which promotes only aesthetic interests is not sufficiently related to the promotion of the police power granted under the Ohio Constitution to sustain an interference with private property rights. *See, e.g., Youngstown v. Kahn Bldg. Co.,* 112 Ohio St. 654 (1925); *State, ex rel. Killeen Realty Co. v. City of East Cleveland,* 169 Ohio St. 375, 383 (1959); *State, ex rel. Srigley v. Woodworth,* 33 Ohio App. 406 (Athens Cty. 1929); *Smith v. Troy,* 18 Ohio L. Abs. 476 (C.A., Miami Cty. 1934). The rationale for this position was eloquently

stated in *Youngstown v. Kahn Bldg. Co., supra,* at 661-662 as follows:

> It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restriction upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are therefore remitted to the proposition that the police power is based upon public necessity, and that the public health, morals, or safety, and not merely aesthetic interest, must be in danger in order to justify its use.

Obviously the Court of Appeals' decision in this case was based upon and reflects this well-settled principle of Ohio law. Since this Court has repeatedly stated that it will not review state court decisions based upon adequate and independent non-federal grounds, even where a federal question is involved, *Berea College v. Kentucky,* 211 U.S. 45, 53 (1908); *Murdock v. Memphis,* 87 U.S. 590, 634-636 (1874), the state law element of the Court of Appeals' decision is another reason why this Court should not grant review.

3. There Are No Special or Important Reasons for Review of This Case by This Court.

Rule 19 of the Rules of Supreme Court of the United States provides, in part, that:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

As demonstrated above, this case is not one which involves any federal question of substance which has not heretofore been decided by this Court nor was the decision below in any way not in accord with applicable decisions of this Court. In addition, Petitioner has presented no other special or important reasons for review by this Court and none exist. Indeed, the unique nature of this case weighs heavily against the issuance of the Writ Petitioner seeks.

As noted above, this case was tried on the theory that Section 1377.06 was unconstitutional *as applied* to each of the individual Respondents. Because of this, an extensive factual record was developed in the trial court. As is apparent from the decision itself, the Court of Appeals' holding was based solely upon this detailed factual testimony. The facts which make up this record are in many respects unique and little likelihood exists that a similar case will ever arise elsewhere. Review of this

decision by this Court would, therefore, be limited to the specific factual considerations presented herein and would have little, if any, general application or impact.

CONCLUSION

In conclusion, Respondents respectfully submit that the Writ of Certiorari prayed for in this action should be denied because:

(1) No substantial federal question for resolution is presented in this action;

(2) The decision below rests in large part on long-established rules of Ohio substantive law; and

(3) The decision below turns upon facts so unique and so inconsequential that any decision by this Court in this case will have little precedential impact.

Respectfully submitted,

RICHARD R. HOLLINGTON, JR.
THOMAS M. SEGER
BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115
(216) 621-0200
Counsel for Respondents